

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TINA MARIE CLARKE,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2003

No. 238359

Genesee Circuit Court

LC No. 01-007527-FC

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions for two counts of first-degree felony murder, MCL 750.316, conspiracy to commit armed robbery, MCL 750.157a, MCL 750.529, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant participated in an armed robbery resulting in the shooting deaths of two brothers, John and Kim Crider. Defendant asserts a multitude of errors including the prosecutions failure to provide sufficient evidence to sustain guilty verdicts on the two first-degree felony murder charges, and with respect to all convictions she challenges that the prosecutor's conduct and the trial court's instructions to the jury denied her a fair trial, and that she was denied the effective assistance of counsel. We find no error. The prosecutor adduced sufficient evidence to sustain guilty verdicts for first-degree felony murder. Any assertion of misconduct was cured by proper instruction by the trial court. The jury instructions were proper. Counsel was not ineffective for failing to object to the instructions because the court properly charged the jury. Finally, defendant's Standard 11 Brief is insufficiently briefed. We affirm.

**I. Sufficiency of the Evidence**

Defendant first argues that the prosecution failed to provide sufficient evidence against her to sustain guilty verdicts for first-degree felony murder as a principal or aider and abettor because the evidence only put defendant at the scene and showed how she obtained and disposed of the gun used at the crime, but presented no evidence aside from her own statement about what happened at the critical time of the shooting. We disagree.

This Court reviews claims of insufficient evidence de novo, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the prosecution proved the essential elements of a crime beyond a reasonable doubt. *People v Johnson*, 460

Mich 720, 723; 597 NW2d 73 (1999). A reviewing court must make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

At trial, the prosecution argued that defendant committed felony murder as a principal or an aider and abettor. The elements of felony murder are:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including ([robbery]) ]. [*Nowack, supra* at 401, quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

To convict a defendant of felony murder as an aider and abettor, the prosecution must prove: (1) the crime charged was committed by defendant or some other person, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave the aid and encouragement. An aider and abettor must have the same requisite intent as that required of a principal. Thus, “the prosecutor must show that the aider and abettor had the intent to commit not only the underlying felony, but also to kill or cause great bodily harm, or had wantonly and willfully disregarded the likelihood of the natural tendency of this behavior to cause death or great bodily harm.” *People v Tanner*, 255 Mich App 369, 419; 660 NW2d 746 (2003) (citations omitted).

Defendant does not dispute that there was sufficient evidence to convict her of armed robbery. She also does not dispute that there was sufficient evidence to show that Plummer committed felony murder by killing the victim. Instead, defendant argues that there was insufficient evidence to support her conviction for felony murder because there was no evidence that she had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.

“The facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm.” *Nowack, supra*, at 401, quoting *Carines, supra*, at 759.

In situations involving the vicarious liability of co-felons, the individual liability of each felon must be shown. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for an unforeseen death that did not result from actions agreed upon by the participants. In cases where the felons are acting intentionally or recklessly in pursuit of a common plan, liability may be established on agency principles. If the homicide is not within the scope of the main purpose of the conspiracy, those not participating are not criminally liable. [*Carines, supra*, at 759, quoting *People v Turner*, 213 Mich App 558, 566-567; 540 NW2d 728 (1995), overruled on other grounds *People v Mass*, 464 Mich 615, 627-628, 628 NW2d 540 (2001).]

Here, defendant admitted to police that she went to the victims' house with the intention of robbing the victims. Defendant changed into dark clothes in preparation for the robbery, separately procured a gun and ammunition, brought the loaded gun to the victims' house where she knew they were home, and provided Patricia Plummer with the loaded weapon knowing that Plummer wanted and planned to shoot the victims.

The essential inquiry is if defendant participated in the robbery with knowledge that Plummer intended to kill or cause great bodily harm so as to permit a rational trier of fact to conclude that defendant acted with wanton and willful disregard sufficient to support a finding of malice. *See Turner, supra*, at 572. In *Turner, supra*, at 572, this Court determined that a defendant's knowledge that her cofelon was armed during the commission of a robbery is enough for a rational trier of fact to find that the defendant, as an aider and abettor, participated in the crime with knowledge of the principal's intent to cause great bodily harm.

Obviously defendant knew Plummer was armed because she provided her with a loaded gun while they were in the home of the victims they had planned to rob. Defendant followed Plummer out of the bathroom in the victims' house and stood by while Plummer shot both Kim and John Crider and then took a wallet. Under these circumstances, we conclude that defendant knew of Plummer's intent to at least cause great bodily harm. Therefore, a rational factfinder could find that defendant was acting with wanton and willful disregard for the likelihood that the natural tendency of this behavior would cause death or great bodily harm. Moreover, defendant's statements to police and the physical evidence directly and inferentially indicate that defendant participated in the Criders' murder with the requisite malice as she admitted giving Plummer the gun knowing that Plummer intended to shoot the victims. The evidence, viewed in a light most favorable to the prosecution was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of felony murder.

## II. Prosecutorial Misconduct

Defendant argues that prosecutor denied defendant a fair trial and violated defendant's due process rights when he mischaracterized evidence, misstated the law, vouched for the credibility of witnesses, denigrated defense counsel, and appealed to the jurors' civic duty. We disagree.

A defendant must object to preserve a claim of prosecutorial misconduct for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Because defendant did not object to all but one of the prosecutor's comments at trial this issue is mainly unpreserved. But, defendant did object to one of the prosecutor's comments in his rebuttal argument and thus this specific argument is preserved for our review. *Id.*

Generally, prosecutorial misconduct is a constitutional claim, that this Court reviews de novo. *People v Pfaffle*, 246 Mich App 282, 288; 631 NW2d 162 (2001). This Court reviews unpreserved claims of prosecutorial misconduct for plain error; to find plain error, this Court must find that error occurred, and that such error was clear or obvious, and affected a defendant's substantial rights. *Schutte, supra*, 240 Mich App 720. Plain error warrants reversal only when it has resulted in the conviction of an innocent defendant, or when it has seriously affected the fairness, integrity, or public reputation of a judicial proceeding. *Id.* This court reviews claims of prosecutorial misconduct on a case by case basis, and must examine the pertinent portion of the

record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

The prosecutor's statements must be considered as a whole and evaluated in light of defense arguments and the relationship they bear on the evidence admitted at trial. *People v Farnsley*, 94 Mich App 34, 36, 287 NW2d 361 (1979). Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not mischaracterize the evidence. *Id.* A prosecutor may not make a statement of fact to a jury unless it is supported by the evidence presented. *Schutte, supra*, 240 Mich App 721. A prosecutor is empowered to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id.*

Defendant argues that the prosecutor misstated the evidence when he stated, "Tina Clarke took a wallet off of Kim Crider, after she had shot him several times" asserting that there was no evidence that defendant took a wallet or shot anyone. Defendant also argues that the prosecutor misstated the evidence when he said defendant manipulated her cousin into believing she was in danger so she could obtain the gun from him when she actually got the gun to commit an armed robbery and kill. We find no reversible error. Any undue prejudice would have been cured by a timely objection and a curative instruction. Further, the court instructed the jury that the lawyers' arguments were not evidence.

Defendant also asserts that the prosecutor mischaracterized the facts when he stated that John Crider's statement after being shot were his "last words" since John Crider lived for two weeks and spoke to other people. And, defendant argues that the prosecutor mischaracterized the facts when he stated defendant's own statement was a "confession" despite her clear assertions indicating abandonment of the crime. We find no error. These were isolated comments and since the claimed errors are unpreserved, there is no plain error here affecting defendant's substantial rights. *Schutte, supra*, 240 Mich App 720.

Defendant argues that the prosecutor mislead the jury when he selectively shared portions of defendant's interview with Elford with the jury and in doing so effectively attempted to convince them that only those portions should be considered due to his superior knowledge of the case. There is no error here. The prosecutor is empowered to argue the evidence and reasonable inferences arising from it as it relates to *his* theory of the case. *Schutte, supra*, 240 Mich App 721.

Additionally, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, and that they were only meant to help the jury understand the evidence and each side's legal theories. Any prejudicial effect that may have been caused by the prosecutor's statements was cured by the trial court's instructions. *Watson, supra*, 245 Mich App 586.

Next, defendant argues the prosecutor improperly asked the jury to sympathize with the victims as a basis to convict defendant when he described the deaths of the victims. A prosecutor may not appeal to a jury to sympathize with a victim. *Watson, supra*, 245 Mich App

591. Here, the prosecutor permissibly commented on the evidence and accurately described the heinous nature of the shootings in this murder trial. Moreover, the prosecutor “did not ask the jury to suspend their judgment and decide the case on the basis of sympathy.” *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). The prosecutor was not required to phrase his arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant also argues that the prosecutor attempted to inflame the emotions of the jurors when he stated John Sanborn and Randy Crider would have been dead as well if they had still been at the house. We do not find the prosecutor’s lone suggestion that there could have been more victims amounted to misconduct. A prosecutor’s comments do not amount to misconduct if they are isolated, do not blatantly appeal to the jury’s sympathies, and are not so inflammatory as to prejudice defendant. *Watson, supra*, 245 Mich App 591.

Defendant also argues the prosecutor argued facts not in evidence and improperly vouched for the prosecution’s theory of the case when he suggested that defendant incriminated herself when she spoke to Elford based on his superior knowledge of facts not produced at trial. “A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully.” *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). Our review of the challenged comments reveals that the prosecutor neither argued facts not in evidence, nor improperly vouched for the detective’s credibility. The prosecutor argued that the detective was worthy of belief based on the evidence and reasonable inferences drawn from the evidence. There has been no reversible misconduct.

Defendant argues the prosecutor misstated the law when he argued that only intent to rob was necessary for the jury to find defendant guilty of murder and argued that defendant was guilty of premeditated murder as well. A prosecutor’s clear misstatement of the law can deprive a defendant of a fair trial, if uncorrected. *People v Grayer*, 252 Mich App 349, 357; 652 NW2d 818 (2002). Here, the prosecutor’s statements were not a clear misstatement of the law, and any suspect articulation was corrected by the judge’s instructions to the jury. The judge properly instructed the jury on the elements of felony murder. This Court will not find plain error if a curative instruction could have cured the prejudicial effect of a prosecutor’s statements. *Watson, supra*, 245 Mich App 586. Because the judge correctly instructed on the law, the prosecutor’s statements do not amount to plain error. *Id.*

Defendant argues the prosecutor improperly made a “civic duty” argument in the last paragraph of his closing argument. In sum, the prosecutor stated that defendant was guilty of the crimes charged and that she should be held accountable based on the evidence. He also stated, “It is time for justice. It is time for guilt.” A prosecutor may not suggest that the jury convict a defendant as part of its civic duty, because such a suggestion introduces issues that are broader than the defendant’s guilt or innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). In this case, the prosecutor did not exhort the jury to return a verdict of guilty because of issues outside defendant’s guilt. Rather, the prosecutor suggested the jury convict defendant because of his guilt. A prosecutor may ask the jury to convict on the basis of the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because the prosecutor did not make a civic duty argument, we find no misconduct.

Defendant argues that the prosecutor, in his rebuttal argument, specifically attacked and denigrated defense counsel when he commented on defense counsel's closing argument. Defendant did object at trial to the prosecutor's comment, but the trial court overruled the objection. A prosecutor may not attack the personal credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). The prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson, supra*, 245 Mich App 592-593. Here, the prosecutor discounted some of defense counsel's arguments in his rebuttal and called them "outrageous." Defendant characterized these statements as denigration of defendant's counsel. Our review of the comments reveals that the prosecutor was merely rebutting defense counsel's arguments. Such a rebuttal is not misconduct, and he is not required to phrase his arguments in the blandest of all possible terms. *Kennebrew, supra*, 220 Mich App 608; *Ullah, supra*, 216 Mich App 678. Since the prosecutor did not denigrate the credibility of defense counsel, or suggest that defense counsel was intentionally trying to mislead the jury, we find the prosecutor's comments proper.

We conclude that the prosecutor did not mischaracterize the facts of the case or attempt to mislead the jury during closing arguments. The prosecutor did not introduce any facts not in evidence during his closing arguments. The prosecutor did not make an improper "civic duty" argument to the jury or improperly attempt to inflame their passions. The prosecutor did not denigrate defense counsel in his rebuttal. The trial judge's instructions cured any misstatements of the law, or appeals to the sympathies of the jury by the prosecutor. We find no misconduct on the part of the prosecutor amounting to plain error depriving defendant of her substantial rights. *Schutte, supra*, 240 Mich App 720.

### III. Jury Instructions

Defendant argues the trial court erred when it misstated the law, gave inaccurate and conflicting definitions of the elements of the crimes, and read the instructions in a confusing manner. We disagree.

This Court reviews de novo a defendant's claim of instructional error. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). This Court reviews unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000) citing *Carines, supra*, 460 Mich 761-764.

"Jury instructions must include all the elements of the charged offenses and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly present the issues for trial and sufficiently protected the defendant's rights. *People v Tate*, 244 Mich App 553, 568; 624 NW2d 524 (2001); *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Our review of the jury instructions indicates the trial court properly instructed the jury on the elements and requisite intent of the charged offenses. Felony murder is a general intent crime, requiring the mens rea of second-degree murder during the commission of a felony. See *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001); *People v King*, 210 Mich App 425, 430; 534 NW2d 534 (1995); *People v Hughey*, 186 Mich App 585, 591; 464 NW2d 914 (1990); *In re Robinson*, 180 Mich App 454, 462; 447 NW2d 765 (1989). When the

underlying felony is a specific intent crime, such as robbery, the specific intent of the underlying felony is required, but this does not transform felony murder into a specific intent crime. See *Hughey, supra*, at 591.

Here, reading the trial court's statements in context, it is clear the court properly explained to the jury that defendant had to have a specific intent to commit the robbery, with the commission of robbery being one of the elements of felony murder. The Court specifically stated that, "[f]or the crime of armed robbery, it means that she must--it must be proven that she intended to commit armed robbery." Further, the element that defendant had to have intended to permanently deprive the victims of their money was in fact related to the jury. We conclude that while felony murder is complex, the court's instructions, albeit somewhat imperfect, as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *Tate, supra*; *Piper, supra*. As such, we find no plain error affecting defendant's substantial rights. *Snider, supra*, 239 Mich App 420 citing *Carines, supra*, 460 Mich 761-764. Further, defendant was not prejudiced by the court's instruction that felony murder and second-degree murder are specific intent crimes.

#### IV. Ineffective Assistance of Counsel

Defendant argues defense counsel was ineffective for failing to insure the trial court properly instructed the jury. We disagree.

This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant's only claim is that defense counsel was ineffective for failing to object to the jury instructions as given by the trial court. Because defendant was not prejudiced by the court's instructions, she cannot show that counsel's performance affected the outcome of the trial.

#### V. Standard 11 Brief

We have reviewed the standard 11 brief defendant filed and hold the issues raised within it are without merit because they are either insufficiently briefed in a manner that does not allow us to address them, irrelevant, or do not support a different outcome of this appeal.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Helene N. White  
/s/ Pat M. Donofrio